No. 11904.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDNA D. HEATH, Executrix of the Last Will of FRED W. HEATH, Deceased, and MYRA C. KNAPP, Executrix of the Last Will of DANIEL A. KNAPP, Deceased,

Appellants,

vs.

JOHN N. HELMICK, Trustee of the Estate of MELANIE DOUILLARD WOODD, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

ERNEST R. UTLEY and
J. GEO. OHANNESON,
417 South Hill Street, Los Angeles 13,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES PAGE

No. 11904.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDNA D. HEATH, Executrix of the Last Will of FRED W. HEATH, Deceased, and MYRA C. KNAPP, Executrix of the Last Will of DANIEL A. KNAPP, Deceased,

Appellants,

vs.

JOHN N. HELMICK, Trustee of the Estate of MELANIE DOUILLARD WOODD, Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

The facts presented in our opening brief were not controverted in appellee's brief. (Court Rule 20.)

Therefore, it is undisputed:

(a) That the Heath and Knapp judgment against Woodd was a valid judgment.

(b) That the execution sale of the Virginia Avenue property made in April, 1943, and the sheriff's deed of April 18, 1944, were legal and valid.

(c) That the two subsequent conveyances in September of 1946, the one from Hovey to Douillard and the other from Douillard to Woodd, were both made without Heath's and Knapp's knowledge and consent.

(d) That the property was at no time an asset of the bankruptcy estate.

As pointed out in our opening brief, the trustee's case, according to the Referee's findings, rests solely on the contract which the trustee claims was made sometime between April, 1943, and August, 1945, under which Heath and Knapp agreed to sell the Virginia Avenue property to Woodd after her discharge as, if and when their judgment against her has been paid in full.

It is, therefore, clear that the trustee's case is one for specific performance of this contract, and the basic and only issue is whether the claimed contract was ever made; and, secondly, whether the judgment was paid in full before bankruptcy in order to entitle Woodd to the equitable remedy of specific performance of said contract.

This, we submit, is the bedrock of the trustee's case, and the insinuations of fraud and conspiracy against Heath and Knapp, as suggested in the trustee's brief, are all irrelevant to this basic issue, and said charge of fraud and conspiracy is a false issue.

In view of the trustee's injection of this false issue, we are impelled to repeat ourselves by presenting the following brief summary of the salient facts.

I.

The Claimed Contract Never Existed.

That the claimed contract, as asserted by the trustee and as found by the Referee, was never made, is established by the sworn testimony of all of the witnesses. There is not a word in the record to suggest or imply that such contract was ever made. We submit that the trustee's inference to the contrary is but an unfounded suspicion.

It is singular that *no facts* are recited in the trustee's answering brief to support his said suspicion.

II.

The Judgment Was Not Paid in Full at Any Time.

This subject is fully discussed in our opening brief on pages 10 to 13 inclusive.

As pointed out in our opening brief, the only cash received by Heath and Knapp on said judgment was the sum of $430.48 and $9.90. The tabulation of the amounts collected on said judgment appears on pages 10 and 11 of appellees' opening brief, and said tabulation is supported by the official records of the sheriff of Los Angeles County. The correctness of this tabulation is rather *supported* (and not contradicted) by Mr. Heath's will of April 22, 1943, in which it was stated that the balance due on the judgment on that date was about $1000.00.

It further appears from said tabulation and from the undisputed evidence in this case that said $1000.00 was arrived at after having *credited* said judgment with the sum of $1746.05 (which was paid by Heath and Knapp for the Virginia Avenue property) and with the further sum of $1260.00 (which was paid by Heath and Knapp for the Glendale property).

There is not a word in the record to show any payment on said judgment after April 22, 1943 (date of the will).

It is incomprehensible why the trustee should harp on said will as being a valuable bit of evidence in his favor.

It is an undisputed fact, therefore, that the judgment was at no time paid, and that Woodd was not entitled to specific performance of the claimed executory contract.

The fact that title to the Virginia Avenue property was placed in Woodd after her discharge through the machinations of Hovey, Douillard and Woodd has no bearing either upon the existence of the claimed contract or upon

the issue of payment of the judgment, as it is undisputed that said conveyances were made without Heath's and Knapp's knowledge and consent.

This subject is discussed fully on pages 18 to 24 inclusive, in our opening brief.

III.

The Claimed Inferences of Fraud and Conspiracy Against Heath and Knapp Are Based Upon Suspicion and Not on Legal Proof.

As pointed out in our opening brief, the Referee's finding of fraud was directed solely against Woodd and not against Heath and Knapp. Moreover, there is not a line, word or sentence anywhere in the record to justify the trustee in branding Heath and Knapp (both of whom are dead) as frauds or conspirators.

Moreover, the issue of the suspected fraud and conspiracy is foreign to the issue of specific performance of the claimed executory contract.

IV.

The Findings of the Referee Are Not in Compliance With Rule 52, Federal Rules of Civil Procedure.

To amplify what we have stated in our opening brief, we respectfully submit that Rule 52 was not complied with in the following additional respects:

1. The characterization of the executory agreement on the part of Heath and Knapp to sell the Virginia Avenue property to Woodd as being a "secret agreement" [Finding V, Rec. p. 59] is ambiguous and imprecise to constitute a finding of an ultimate fact as required by Rule 52.

2. The language in the same finding on page 60 of the Record to the effect "that the said real property above de-

scribed purchased at the Sheriff's sale in the name of respondent M. L. Hovey, was [p. 61] to be held by said M. L. Hovey until attorneys' fees *in an agreed amount* was paid by the bankrupt . . . That the *agreed* attorneys' fees were thereafter and before the filing of the voluntary petition herein, paid by the bankrupt . . ." in no way complies with Rule 52.

If the Referee knew the amount which was agreed upon to be paid, then said amount should have been stated in the finding; and if he did not know the amount which was agreed upon to be paid, then how can the Referee find as a fact that *this unknown amount* has been paid?

We respectfully submit that the order and judgment appealed from are erroneous, and same should be reversed with costs.

Respectfully submitted,

ERNEST R. UTLEY and
J. GEO. OHANNESON,
Attorneys for Appellants.